<Symposium Article>

Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects[Ψ]

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Abstract:

The recognition of rivers and related ecosystems as legal persons or subjects is an emerging mechanism in transnational practice available to governments seeking more effective and collaborative natural resource management, sometimes at the insistence of Indigenous peoples. This approach is developing particularly quickly in Colombia, where legal rights for rivers and ecosystems are grasping on to, and evolving out of, constitutional human rights protections. This enables the development of a new type of constitutionalism of nature. Yet legal rights for rivers may obscure the rights of Indigenous peoples and their role in resource ownership and governance. We argue that the Colombian river cases serve as a caution to courts and legislatures elsewhere to be mindful of Indigenous peoples' and local communities' complex and interrelated rights, interests and tenures in devising ecosystem rights.

[Ψ] This contribution is part of a collection of articles growing out of a Research Workshop on Indigenous Water Rights in Comparative Law', held at the University of Canterbury, School of Law, Christchurch (New Zealand), on 7 Dec. 2018 funded by the New Zealand Law Foundation.

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Key words: Colombia, ecosystem rights, biocultural rights, legal personhood.

1. INTRODUCTION

In the 21st century, legal models that recognize or declare rivers and their ecosystems to be legal persons or legal subjects have emerged as a possible tool for settling disputes between local communities and governments over natural resource management, via either legislation or judicial decisions. Such disputes often concern a natural resource that is subject to threat or under pressure and a failure by existing laws and institutions effectively to protect the resource from development. As such, legal person or legal subject models have emerged as new mechanisms to encourage governments to provide more effective, and collaborative, natural resource management, often involving local communities as 'guardians'.[1]

These developments are *ad hoc*, and in many cases have been driven by Indigenous, ethnic, or local communities, who have experienced historical injustices in terms of land and resource dispossession. These communities hold distinctive relationships with nature or the environment which may be more reflective of ecocentric philosophical approaches than their Western counterparts. In many cases, they now have extensive land holdings or recognized rights to participate in or control natural resource management.

Some might argue that legal person or legal subject models are a useful tool available to Indigenous peoples in settling claims to natural resources.[2] One example is the Whanganui River in Aotearoa (New Zealand), which was declared to be a 'legal person' in 2017, as part of a reparative settlement of the historical river claims of local Māori.[3] Community activism for legal rights for rivers and ecosystems has occurred in countries as diverse as Mexico, the

[1] See generally C. Stone, *Should Trees have Standing? Law, Morality, and the Environment* (Oxford University Press, 2010).

[2] See, e.g., D. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press, 2017).

[3] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2016* (NZ).

United States (US) and Bangladesh, although not always at the insistence of Indigenous peoples.[4]

One country where the recognition of rights for rivers and related ecosystems is developing particularly quickly is the South American nation of Colombia, where a number of Indigenous communities maintain traditional territories and continue to fight for recognition of their rights to control and manage natural resources. In late 2016, the Constitutional Court of Colombia declared the Atrato River, threatened by unlawful mining, deforestation, and contamination, to be an '*entidad sujeto de derechos*' (legal subject) with reference to the distinctive biocultural rights of the Indigenous and Afrodescendent communities who call the river region home. The Court's decision reflects the community perception of the river as a spiritual being or ancestor that provides for life and culture and requires care and guardianship, and not merely as a resource to be exploited.[5] As part of its orders for protection of the river's rights, the Constitutional Court devised an innovative and complex collaborative governance scheme involving a number of government entities, non-governmental organizations (NGOs), and local and Indigenous 'guardians'. The ruling emphasized the need for participation by Indigenous and Afrodescendant communities in decision making about their traditional river territory, and the key role to be played by Indigenous relationships with and knowledge of nature to further its protection.

Several other courts and local or regional tribunals in Colombia have since handed down decisions that recognize ecosystems to be legal subjects, drawing on protections in Colombia's Constitution within the framework of its '*Estado Social de Derecho'* (or social

[4] See generally E. O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance*, (Routledge, 2018), pp. 15-22.

[5] E. Macpherson & F. Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (2015) 25(6) *The Journal of Water Law*, pp. 283–93.

welfare state based on the rule law).[6] The Colombian Amazon, Río Cauca, Páramo de Pisba, Río La Plata, Río Coello, Río Combeima and Río Cocora (Tolima Rivers), Río Otún, and recently the Río Magdalena (Colombia's most strategically important river),[7] all of which have strong aquatic components, are now legal subjects with their own rights of protection, conservation, restoration, and maintenance.[8] In July 2019, the executive branch of the Department of Nariño proposed an administrative decree to recognize the rights of nature and protection of priority ecosystems such as wetlands, lakes, and rivers.[9] At the end of 2019, a Congressman put forward a broad reform initiative to recognize nature as a legal subject with its own rights within the right to a healthy environment enshrined in Article 79 of the Colombian Constitution.[10]

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[6] See generally A. Maya-Aguirre, 'Implementing Environmental Constitutionalism in Colombia: Tensions between Public Policy and Decisions of the Constitutional Court', in E. Daly & J. May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press), pp. 143–58; P.A. Acosta Alvarado & D. Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) (2018) *Journal of Environmental Law*, pp. 519–26; L. Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(13) *Resources MDPI* pp. 8-9.

[7] The Magdalena River crosses Colombia from South to North and 74% of the Colombian population live in its watershed. See R.A. . Restrepo, *Los sedimentos del río Magdalena: reflejo de la crisis ambiental [Sediments of Magdalena River: The Reflexion of the Environmental Crisis]* (Universidad Eafit, 2005), pp. 60–1.

[8] *Juan Luis Castro Córdoba y Diego Hernán David Ochoa v Ministerio de Ambiente y Desarrollo Sostenible y otros* (2019) Tribunal Superior, Sala Cuarta Civil Medellin [Medellin State Superior Tribunal, Civil Court number Fourth] N. 2019-076 (Colombia) ('Cauca River case'); *Personeria Municipal de Ibagué Ministerio de Medio Ambiente y otros,* (2019) Tribunal Administrativo de Tolima [Administrative Tribunal of Tolima] (Colombia) ('Tolima Rivers case'); *Luz Marina Diaz y otros v Empresa de Servicios Públicos del Municipio de La Plata – Huila,* (2019) Corte Constitucional [Constitutional Court] No. 2019-114 (Colombia) ('La Plata Huila River case'); *Juan Carlos Alvarado Rodriguez y otros v Ministerio de Medio Ambiente y otros* (2018) Corte Constitutional [Constitutional Court] Tribunal Administrativo de Boyacá [Administrative Tribunal of Boyacá] No 15238 3333 002 2018 00016 01 (Colombia) ('Paramo de Pisba case'); 'La sentencia que otorgó derechos al río Otún, en Risaralda' [The sentence that granted rights to Otun River in Risalda] (2019); 'Andres Felipe Rojas Rodriguez y Daniel Leandro Sanz Perdomo v. Ministerio de Ambiente y Desarrollo Sostenible y otros (2019) Juzgado Primero Penal del Circuito de Neiva Huila [First Criminal Tribunal of the Circuit of Neiva Huila] 41001-3109-001-2019-00066-00 (Colombia) ('Magdalena River case'); *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, Jose Daniel y Felix Jeffry Rodríguez peña y otros v Presidente de la República y otros* (2018) Corte Suprema de Justicia [Supreme Court], Sala de Casación Civil [Appeals Chamber] STC4360-2018 A (Colombia) ('Amazon case').

[9] L.M. Sanchez Pico, 'RCN radio, Nariño, primer departamento que reconoce los derechos de la naturaleza' [Narino, First Department to Recognize the Rights of Nature] (22 July 2019) Colombia.

[10] J.C. Lozada Vargas, 'Proyecto de Modificacion del Artículo 79 de la Constitución' [Constitutional Amendment Project to Modify Article 79] 2019 (Colombia).

The Colombian Government recently sought an opinion from the Inter-American Court of Human Rights as to the duties of states emerging from various international human rights in dealing with the environment. In response to this request, the Court linked the right to a clean and healthy environment[11] with growing transnational movements around the rights of nature.[12] In its ruling, and citing the *Atrato* case, the Court emphasized that:[13]

> This Court considers it important to highlight that the right to a healthy environment as a standalone right, in difference to other human rights, protects all the components of the environment, like forests, rivers, oceans and others, as a legal end in itself, even in the absence of certainty or evidence of risk to individual persons. In this sense, the Court notes a tendency to recognize legal personality and, ultimately, the rights of nature not just in judicial decisions but also in constitutional laws.

It is now fair to observe that the emerging concept of ecosystem rights is being shaped by Colombian experiences.[14] Since the *Atrato* decision, around ten legal developments have taken place in Colombia (including court cases, administrative decrees, and legislative reform proposals) in which nature or natural resources like rivers have been recognized as legal

[11] See J.H. Knox & R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) for an analysis of the right to a healthy environment in international law.

[12] Inter-American Court of Human Rights, *Opinión Consultiva OC-23/17 solicitada por la República de Colombia sobre medio ambiente y derechos humanos [Consultive Opinion OC-23/17 sought by the Republic of Colombia about the Environment and Human Rights]*, (2017).

[13] Ibid., para. 62.

[14] Some of the countries that have referred to the Atrato case when granting legal personhood to rivers and ecosystems are Brazil, El Salvador, Mexico, Sweden, Uganda, and the United States (US). See, e.g., *United Nations Harmony with Nature, Report of the Secretary General Assembly United Nations Harmony with Nature, Report of the Secretary General Assembly* A/74/236. (2019); *Constitución Ciudad de México [Ciudad de Mexico Constitution] 2018 (Mexico) ('Ciudad de Mexico Constitution')*; *Constitución Política del Estado Libre y Soberano de Colima [Political Constitution of the Free and Sovereign State of Colima] 2017 (Mexico) ('Political Constitution of the State of Colima')*; *Vecinos Laguna del Carpintero v Presidente Municipal de Tampico Tamaulipas y otros*, (2018) Suprema Corte de Justicia de la Nacion [Supreme Court of Justice of the Nation] Primera Sala [First Chamber] N. 307-2016 (Mexico) ('Laguna Carpintero case'); Lake Erie Bill of Rights 2019 (USA); 1855 Treaty Authority, 'Chippewa Establishing Rights of *Manoomin* on White Earth Reservation and Throughout 1855 Ceded Territory 2019 (US)'; 'Resolution to amend the Ho-Chunk Constitution and Provide for the Rights of Nature 2015 (US)'; 'Amendment for the Rights of Nature in the Constitution of Sweden' (2019).

persons or legal subjects. Sometimes these developments make reference to Indigenous peoples' rights or cosmologies, including as guardians. At other times, they recognize relationships between nature and local communities, small agricultural or peasant communities, citizens, or future generations.[15] This begs the question for Indigenous peoples and local communities in other parts of Colombia and beyond whether legal rights for rivers and ecosystems can also help them demand better and more collaborative river and ecosystem management within traditional areas.

Acknowledging the comparative significance of the Colombian cases and the clear cross-fertilization of transnational examples of legal rights for rivers, in this article we examine the legal foundation of the key cases granting legal rights to rivers and ecosystems in Colombia, and consider their potential relevance for Indigenous peoples. We do this through a detailed analysis of the most recent legal and political decisions to recognize ecosystems as legal subjects in Colombia, many of which are unknown to an English-speaking audience. Our analysis is contextualized through related and regional scholarship.

Although the cases analyzed in this article can only be understood properly in Colombia's particular constitutional and cultural context, they all reveal important clues as to possible inroads for better protection of Indigenous river and ecosystem rights and interests elsewhere. They show how ecosystem rights are grasping on to, and evolving out of, constitutional protections, departing from Western laws for the regulation of the natural world and developing a new type of constitutionalism for nature.

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[15] See *Mohd Salim v State of Uttarakhand & others, WPPIL 126/2014*, (2017) (India) ('Ganges and Yamuna case'); 1855 Treaty Authority, 'Chippewa Establishing Rights of Manoomin on White Earth Reservation and Throughout 1855 Ceded Territory 2019 (US)'; *Ordinance Establishing Sustainability Rights Santa Monica 2013 (USA)*; *Resolution Establishing the Rights of the Klamath River, Yurok Tribe (USA)* (2019); *Ciudad de Mexico Constitution*, n. 14 above; Paralelo 32, *Ordenanza 11.462 Santa Fe Municipality, 2019 (Argentina)* (2019); *Laguna Carpintero case*, n. 14 above; *Political Constitution of the State of Colima*, n. 14 above; 'Lake Erie Bill of Rights 2019 (USA)', n. 14 above; 'Resolution to amend the Ho-Chunk Constitution and Provide for the Rights of Nature 2015 (US)', n. 14 above .

Yet, our analysis of legal and political decisions on ecosystem rights in Colombia reveals that, although progressive legal developments certainly happen, in some cases the courts ignore or obscure the rights and perspectives of Columbia's Indigenous peoples. This suggests that the Courts have failed to engage deeply with the complex nature of Indigenous interests, tenures, and role in river governance. For example, the Colombian Supreme Court's decision to recognize the Colombian Amazon as a legal subject, although theoretically ground-breaking in its recognition of the rights of future generations, apparently ignores the rights of Indigenous peoples to their traditional territories and their key role in the management and protection of river ecosystems. Various government and non-governmental bodies implementing the Amazon decision have picked up on this oversight and attempted to involve Indigenous communities in giving effect to the Court's orders. Yet, as we detail below, the courts in subsequent cases have also failed fully to appreciate the relevance of their judgments for Indigenous peoples, or the potential application of the Atrato concept of 'biocultural rights'. We argue that the Colombian river cases serve as a caution to courts and legislatures elsewhere to be mindful of the rights and interests of local communities and the social, cultural and environmental complexities of land tenure.[16]

2. INDIGENOUS PEOPLES AND COLOMBIAN LAW

Since the Spanish colonization of Colombia in 1499, Indigenous peoples have suffered disposition and loss of their traditional territories and disrupted access to their water

[16] See also M.F. Solis, 'Derechos de la naturaleza y pueblos indígenas' [Rights of Nature and Indigenous Peoples] (2019) Universidad Andina Simon Bolivar Boletin Electrónico Spondylus; P. Lyver, J. Ruru, N. Scott, J. M. Tylianakis, J. Arnold, S. K. Malinen, C. Y. Bataille, M. R. Herse, C. J. Jones, A. M. Gormley, D. A. Peltzer, Y. Taura, P. Timoti, C. Stone, M. Wilcox, & H. Moller, 'Building Biocultural Approaches into Aotearoa – New Zealand's Conservation Future' (2019) 49(3) *Journal of the Royal Society of New Zealand,* pp. 394–411.

resources.[17] Spanish conquerors explored Colombia in their search for gold and spices, poisoning the waterways, converting Indigenous peoples to slaves, and spreading fear and shame.[18] Since definitive independence in 1819, Colombian legal frameworks have largely failed to include or benefit Indigenous peoples, and successive land policies and 'agrarian reforms' have gradually encroached upon and privatized Indigenous landholdings.[19] Some Indigenous lands have been retained and protected under the Colombian '*resguardo'* [reservation] system, or in the case of Afrodescendent communities, in similar reservations called '*consejos mayores'* [councils].[20] However, Colombian governments have been unable or unwilling to address inequity in the distribution of land tenure and have almost completely ignored the question of Indigenous and Afrodescendent rights to water.

Approximately 24% of the territory of Colombia is Indigenous land. This land is the home of around 90 different Indigenous peoples based in 710 *resguardo*s.[21] The majority of this Indigenous territory is concentrated in the Amazon area of Colombia[22] with a total of 26,217 hectares across 185 *resguardos*.[23] Afrodescendants or Afro-Colombian people comprise

[17] E. Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, 2019), p. 132.

[18] E. Galeano, *Las Venas Abiertas de América Latina [Open Veins of Latin America]*, Siglo XXI ed. (Monthly Review Press, 2004), at p. 61.

[19] B. Gomez Hernandez, 'La Tenencia de la Tierra y la Reforma Agraria en Colombia [Land Tenure and the Agrarian Reform in Colombia]' (2011) Enero-Junio, *Verba Iuris*; A.-M. Franco-Cañas, 'Reforma agraria en Colombia: Evolución histórica del concepto. Hacia un enfoque integral actual' [Agrarian Reform in Colombia: Historical Evolution of the Concept. Towards a Current Integral Approach] (2011) 27, Cuaderno de Desarrollo Rural.

[20] See generally Gomez Hernandez, n. 19 above, pp. 68-70; Franco-Cañas, n. 19 above.

[21] Departamento Administrativo Nacional de Estadísticas [Administrative Department of National Statistics], 'Una Nación Multicultural – Su diversidad étnica' [A multicultural Nation- Its Ethnic Diversity] May 2007, available at: https://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf. A total of 1,905,617 peoples self-recognized as part of an ethnic group.

[22] R. Arango & E. Sanchez, '*Los pueblos indígenas de Colombia en el umbral del nuevo milenio. Población, cultura y territorio: bases para el fortalecimiento social y económico de los pueblos indígenas' [Indigenous Peoples of Colombia in the Threshold of a New Millenium. Population, Culture and Territory: Foundations for the Social and Economic Strenthening]* (Departamento de Planeación Colombia, 2004), p. 43.

[23] Colombian Amazon Ampliación de Resguardos Indígenas en la Amazonia Colombiana [Extenstion of the Indigenous 'Resguardos' in the Colombian Amazon], available at: http://siatac.co.

10.5% of the population,[24] and live mainly on the Caribbean and Pacific coasts in deep social, economic and political marginalization.[25] Against this social context, Indigenous and Afro-Colombian lands continue to be threatened by resource extraction (legal and illegal), including the industrialised rubber trade, logging, and mining.[26]

The collective property rights of Indigenous peoples are now protected in the Colombian constitutional framework, within the 'third generation of human rights' and its protections of cultural and social rights. The *Constitución Política de la República de Colombia [Political Constitution of the Republic of Colombia] 1991* (Constitution) recognizes the pluri-ethnic and multicultural character of Colombian society. The *resguardos* are protected in article 329 of the Constitution, giving indigenous *Consejos* (boards) specific management and decision-making powers over natural resources within their territories.[27] A number of other domestic laws also recognize the Indigenous *reguardos* and the Afro-Colombian right to collective land.[28]

The constitutional protections of the land rights of Indigenous peoples do not make any specific mention of Indigenous rights to water and, given that land and water are separately allocated and regulated under Colombian law, there is no explicit constitutional protection of

[24] Departamento Administrativo Nacional de Estadísticas [Administrative Department of National Statistics], 'DANE Ethnic Diversity', available at: https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/grupos-etnicos/informacion-tecnica.

[25] See, e.g., M. A. Velez, J. Robalino, J.-C. Cárdenas, A. Paz, & E. Pacay, '¿La titulación colectiva es suficiente para proteger los bosques? Evidencia de las comunidades afrodescendientes del pacífico colombiano' [Is Collective Titling Enough to Protect Forests? Evidence from Afro-descendant Communities in the Colombian Pacific Region] (2019) *SSRN Electronic Journal* available at *http://ideas.repec.org/p/col/000089/017137.html*; F. Urrea-Giraldo, 'La población afrodescendiente en Colombia' [Afro-descendants population in colombia] (2005) Pueblos indígenas y afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas, pp. 219-245.

[26] J. Blanco Blanco, 'Tierra, Autonomía y Ancestralidad, una Triada de Poder al Interior de la Jurisdicción Especial Indígena en Colombia' [Land, Autonomy and Ancestrality, a Trilogy of Power Inside the Interior of Indigenous Special Jurisdiction of Colombia] (2011) II *Revista Prolegómenos - Derechos y Valores*, pp. 25–44, at 30.

[27] See also *Constitución Política de Colombia [Political Constitution of Colombia] 1991 (Colombia)* (*'Political Constitution of Colombia'*), article 63.

[28] See *Law 21 1991* (Colombia), *Law 160 1994* (Colombia); *Law 70 1993* (Colombia).

an Indigenous right to water. Water is considered a 'common good', regulated by the *Código Civil Colombiano 1887 [Colombian Civil Code]* 1887] and *Código Nacional de Recursos Naturales y de Protección al Medio Ambiente 1974 [Natural Resources and Environmental Protection Code 1974]*. Private water use rights are allocated by way of an administrative concession, and nowhere in the Colombian water laws is there a specific provision for the use of water by Indigenous peoples or in Indigenous territories.[29] There is a prioritization of water allocated for human use, in order to protect water access of vulnerable people, in *Decree 1541 1978*, on which Indigenous people too may rely for water access for basic human needs. However, in a context of weak government regulation and oversight,[30] private users have generally encroached upon customary and informal water use.[31] The government has also relied at times on conservation and common good discourses as a justification to evict Indigenous peoples from their territories or resources.[32] This has enabled large elites to take advantage of the exclusion of local communities and Indigenous peoples from official water law frameworks and the weak recognition of their water rights. [33]

[29] Macpherson, n. 17 above, p. 140.

[30] For indicative media coverage, see Bloqueo en la vía Panamericana deja un saldo de 13 heridos [Blocade of the Panamerican Highway leaves a toll of 13 injured] (14 Mar. 2019) available at: https://www.elespectador.com/noticias/nacional/cauca/bloqueo-de-la-panamericana-en-cauca-deja-un-saldo-de-13-heridos-articulo-844917.

[31] I. Gentes, 'Derecho de Aguas y Derecho Indígena. Hacia un Reconocimiento Estructural de la Gestión Indígena del agua en las Legislaciones Nacionales de los Países Andinos' [Righs of Water and Indigenous Land: To the Structural Recognition of Indigenous Management of Water in the National Legislations of Andean Countries] (2002) 1 *Revista de Derecho Administrativo Económico*, pp. 81–111, at 58.

[32] See United Nations Human Rights Council, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (2017) available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46; V. Tauli Corpuz, UN *S*pecial Rapporteur on Indigenous Peoples rights, 'Conservation a Pretext to Evict Indigenous Peoples' (2016) available at https://youtu.be/xgBqgSkWV5o.

[33] M. C. Roa-García, P. Urteaga-Crovetto, & R. Bustamante-Zenteno, 'Water Laws in the Andes: A Promising Precedent for Challenging Neoliberalism' (2015) 64 *Geoforum*, pp. 270–80, at 140; B. Duarte-Abadía and R. Boelens, 'Disputes over Territorial Boundaries and Diverging Valuation Languages: The Santurban Hydrosocial Highlands territory in Colombia' (2016) 41(1) *Water International*, pp. 15–36.

The rich biodiversity and mineral wealth of Indigenous territories has left Indigenous peoples highly vulnerable to resource conflict.[34] In the Colombian Amazon, for instance, illegal logging and clearing for agriculture and mineral extraction has produced constant conflict and environmental damage.[35] Colombia is generally considered to be hydro-rich, but water resources are unevenly distributed, with the vast majority of water going to economic, private uses including agriculture and industry, at the expense of Indigenous communities that place a higher social and cultural value on water.[36] Neither constitutional protections nor water law frameworks have gone far enough to guarantee the rights of Indigenous peoples to own the natural resources within their territories, nor do they capture the dynamism of Indigenous and customary legal systems.[37] Ignoring the water rights of ethnic communities as a resource for life, livelihood, and cultural identity has become a source of conflict between governments and Indigenous peoples in an ongoing struggle for Indigenous water justice.

3. CONSTITUTIONALIZING ECOSYSTEMS IN COLOMBIA

The foundation of Colombia's Constitution is the concept of the *Estado Social de Derecho*, meaning a social welfare state based on the rule law, and accompanying guarantees of human dignity ('*vida digna*') and common welfare ('*bienestar general*').[38] The Colombian Constitution is often referred to as the 'Ecological' or 'Green Constitution' due to its broad environmental and natural resource protections, considered progressive in both the regional

[34] See A. Acosta, *La maldicion de la abundancia [The Curse of Abundance]* (Abya Yala, 2009).

[35] See, e.g., sostenibilidad.semana.com, 'La Colombia amazónica al desnudo', available at: https://sostenibilidad.semana.com/medio-ambiente/articulo/la-colombia-amazonica-al-desnudo/44588'.

[36] Macpherson, n. 17 above, p. 139. In relation to the broad hydrological conditions in Colombia, see M. del Pilar García Pachón, *Régimen Jurídico de los Vertimientos en Colombia: Análisis desde el Derecho Ambiental y el Derecho de Aguas* [The Legal Regime for Wastewater in Colombia: An Environmental and Water Law Analysis] (Universidad Externado de Colombia, 2017), p. 23.

[37] Gentes, n. 31 above, p. 91.

[38] Political Constitution of Colombia, n. 27 above, Arts 1, 2, 366.

and international context.[39] More than 30 constitutional provisions protect environmental interests, including both rights and obligations. In particular, Articles 79 and 80 recognize the collective right of all people to a healthy environment. These provisions specify the responsibility of the State to: protect the diversity and integrity of the environment; conserve areas of special ecological importance; plan the management and use of natural resources and guarantee their sustainable development, conservation, restoration or substitution; and prevent and control environmental deterioration.[40]

Alongside the protection of Indigenous *resguardos* in Article 329 of the Constitution and associated powers of management,[41] the Constitution recognizes that Indigenous peoples have a responsibility to 'oversee the conservation of natural resources'.[42] It requires that exploitation of natural resources within Indigenous territories be done 'without prejudice to the cultural, social, and economic development of Indigenous communities' and 'in decisions that are adopted with respect to said exploitation, the Government will promote the participation of the representatives of the respective communities'.[43] These social and environmental protections sit uneasily within the Colombian Constitution alongside its pro-development elements, for example the provisions enabling the privatization of certain public services.[44]

Colombia has a reputation for having a strong judiciary, prepared to uphold the Constitution's human rights protections. It sees itself as both a creator and enforcer of laws,[45]

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[39] O. Amaya Navas, *La constitución ecológica de Colombia: análisis comparativo con el sistema constitucional latinoamericano* [The Ecological Constitution of Colombia: A Comparative Analysis of the Latin American Constitutional System] (Universidad Externado de Colombia, 2002), pp. 149-279.

[40] Political Constitution of Colombia, n. 27 above, Arts. 1, 2, 8, 49, 79, 86, 88, 95, 333, 366.

[41] Ibid., Art. 63.

[42] Ibid., Art. 330, 5.

[43] Ibid., Art. 330.

[44] See generally R. Urueña, 'The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance' (2012) 6 *Regulation & Governance*, pp. 282–99; Roa-García et al, n. 33 above.

[45] *José Manuel Rodríguez Rangel v Enrique Chartuny González* (1992) (Colombia).

in distinction to other Latin American countries of the civil law tradition such as Chile, which see the power to make law as something reserved for the legislature.[46] This might seem unexpected, given Colombia's evident history of human rights abuses and the killing of environmental activists.[47] However, the Colombian Constitutional Court has taken a particularly active approach in developing its jurisprudence as a check on unbridled development, especially in the absence of strong administrative and legislative government.

Despite there being no specific recognition of a right to water in the Constitution, the Constitutional Court has developed a line of jurisprudence that attempts to protect the human right to water,[48] including for Indigenous communities, in reliance on international law protections including the Indigenous and Tribal Peoples Convention (ILO Convention 169),[49] which Colombia has ratified.[50] The Constitution has also provided authority for a wide range of public interest cases brought by NGOs and grassroots organizations in the defence of environmental or Indigenous rights with respect to water,[51] using the '*acción de tutela*' under Article 86; a writ for the protection of constitutional rights. A key example of this is the case of the *Río Bogotá*, which flows through the country's capital, known as one of the most polluted rivers in Colombia. In that case the *'Consejo de Estado'* (Council of State) made a series of

[46] Macpherson, n. 17 above, p. 141.

[47] See Colombia: 'staggering number' of human rights defenders killed in 2019

(UN News Global perspective Human stories, 14 January 2020) available at https://news.un.org/en/story/2020/01/1055272.

[48] Roa-García et al., n. 33 above; G. Amparo Rodríguez & A. Gómez Rey, 'La participación como mecanismo de consenso para la asignación de nuevos derechos' [Participation as a Consensus Mechanism for Assignment of New Rights] (2013) 37 *Pensamiento Jurídico*, pp. 71–104.

[49] Geneva (Switzerland), 27 June 1989, in force 5 Sept. 1991, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

[50] See, e.g., *Marcos Arrepiche v Alcalde del Municipio de Puerto López y el Gobernador del Meta [Marcos Arrepiche v the Mayor of Puerto López and the Governor of Meta]* (2010) (Colombia).

[51] Maya-Aguirre, n. 6 above.

very prescriptive orders in response to serious environmental contamination of the river, although without recognizing the river as a legal subject.[52]

Since 2016, a string of Colombian constitutional cases have recognized the rights of natural resources or ecosystems as legal subjects.[53] As the institution charged with upholding the administration of justice and safeguarding the integrity and supremacy of the Colombian Constitution,[54] the Colombian courts have played a key role in Colombia's expansion of ecosystem rights. Yet at the same time, the courts have provided legitimacy for the use of state powers and the development of natural resources, requiring the Government to comply with environmental and human rights obligations in the Constitution and find new ways to address urgent environmental and social issues. The developing jurisprudence has prompted a recent proposal for a Constitutional amendment to protect the rights of nature, as follows:[55]

> Nature, as a living entity and legal subject, will enjoy the protection and respect of the State and the people in order to secure its existence, habitat, restoration, maintenance and regeneration of its vital cycles, together with the conservation of its structure and ecological function.

We consider in more detail the constitutional cases that have recognized the rights of natural resources or ecosystems as legal subjects in the following section.

3.1 The Atrato River as a Legal Subject

Clearly the most significant development on legal rights for nature to come out of Colombia is the November 2016 decision of the Constitutional Court with respect to the Atrato River.[56] This

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[52] *Gustavo Moya Ángel y otros v Empresa de Energia de Bogota y Otros [Gustavo Moya Angel and others v the Bogotá Energy Company and others]* (2014) (Colombia). See also Luis Felipe Guzmán Jiménez, *Las aguas residuales en la jurisprudencia del Consejo de Estado: periodo 2003-2014 [Wastewater in the Jurisprudence of the Administrative Court of Colombia: 2003-2014]* (Universidad Externado de Colombia, 2015), p. 18.

[53] *United Nations Harmony with Nature*, n. 14 above.

[54] Political Constitution of Colombia, n. 27above, Arts 116, at 241.

[55] Lozada Vargas, Proyecto de Modificación del Articulo 79 de la Constitución [Constitutional Amendment Project to Modify Article 79] (2019), p. 1 (*Authors' translation*).

[56] See generally Macpherson, n. 17 above; Macpherson and Clavijo Ospina, n. 5 above, pp. 283-93.

decision concerned Colombia's third longest river, the Atrato. The Atrato is a major economic and strategic asset for the people that live alongside and use the river, within Chocó, the poorest region of Colombia which has an ethic concentration of 97% Indigenous and Afrodescendent constituents.[57] The Atrato is also a major environmental asset and is part of a massive aquatic basin covering 40,000 square kilometres and 60% of the Department of Chocó, fed by more than 15 rivers and 300 streams.[58] The catchment area is heavily forested and rich in biodiversity, but this biodiversity is increasingly threatened by encroachment from illegal mining into remote and traditional territories (Indigenous reservations or *resguardos* and Afrodescendent *consejos mayores*).[59] The illegal mining threatens not only local and ethnic community livelihoods, but the particular cultural and spiritual connections the Indigenous and Afrodescendent communities of Chocó have with the Atrato River.[60] It has caused the extreme desecration of the river and corresponding impacts to human life, as dredging, mercury and cyanide are used in the mining process.[61]

The communities raised their concerns about the situation of the Atrato with Tierra Digna, a human rights NGO based in Colombia working with a number of Indigenous and Afrodescendent groups in Chocó. Until then, the communities had met an overwhelming ignorance or apathy from multiple levels of government, who had little presence or interest in

[57] Departamento Nacional de Estadística, *Censo General 2005: 'Proyecciones Nacionales y departamentales de población 2005-2020' [National and Departmental Population Projections]* (2010).

[58] 'Estructura Ecológica Principal de la Región del Chocó Biogeográfico' [Main Ecological Structure of the region Choco Biogeographic] IIAP (2011), available at: http://rioatrato.org.

[59] See generally U. Oslender, 'Fleshing out the Geographies of Social Movements: Colombia's Pacific Coast Black Communities and the "Aquatic Space"' (2004) 23(8) *Political Geography*, pp. 957–85, at 980; 'Estructura Ecológica Principal de la Región del Chocó Biogeográfico, n. 57 above.

[60] Macpherson & Clavijo Ospina, n. 5 above, pp. 283–93; U. Oslender, n. 59 above, pp. 980–1.

[61] See generally Macpherson, n. 17 above, pp. 142–45.

Chocó. This inaction was compounded by the inability of existing legal frameworks to manage the region's growing environmental and humanitarian crisis.[62]

In the *acción de tutela*, Tierra Digna alleged that, in failing to control the activities of illegal miners in Chocó, the State had violated their fundamental rights to life, health, water, food security, healthy environment, culture, and territory under the Constitution.[63] The claimants were successful, with the Court finding that the Government had violated all of the fundamental constitutional rights alleged to have been breached through the Governments' omission to control and eradicate illegal mining in Chocó.[64] Then, significantly, the Court recognized that the Atrato River, together with its basin and tributaries, is an '*entidad sujeto de derechos*' (legal subject) with its own rights of protection, conservation, maintenance, and restoration by the State and ethnic communities.[65]

The Court made several prescriptive orders to implement its decision,[66] including that the rights of the river will be represented by a guardian, with one representative from Government and one from the claimant communities, which it borrowed from the model for the Whanganui River in Aotearoa New Zealand.[67] Other orders require the establishment of a number of collaborative fora for implementing various directives of the judgment, involving representatives from the communities, government, academia, and NGOs.

The most interesting aspect of the Atrato decision is its theoretical depth. Given the failure of existing legal frameworks and administrative efforts, the Court decided that a new

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[62] *Centro de Estudios para la Justicia Social 'Tierra Digna' y otros v Presidente de la República y otros* (2016) Corte Constitucional [Constitutional Court], Sala Sexta de Revision [Sixth chamber] (Colombia) No. T-622 of 2016 (10 November 2016), 4–7 ('Atrato river case').

[63] Ibid., pp. 4–7.

[64] Ibid., p. 158.

[65] Ibid., pp. 158–9.

[66] Ibid., pp. 157–60.

[67] See Macpherson & Clavijo Ospina, n. 5 above, at pp. 283–93.

theory of rights was needed to compel the Government to do something about the Atrato crisis.[68] It came up with a new constitutional theory of 'biocultural rights', based on a 'profound unity between nature and the human species'.[69]

The concept of 'biocultural rights' has been described as an innovative approach towards combining conservation with respect for indigenous rights and community rights of stewardship for natural resources,[70] yet it needs further development in the comparative and theoretical literature. The Court in Atrato uses the term to mean something more than simply claims to property, in the conventional sense of property as a measurable, commodifiable, and alienable resource.[71] Rather, biocultural rights are collective rights of communities that carry out traditional roles of regulating nature as conceived of by Indigenous ontologies.[72] The Court calls this 'an alternative vision of the collective rights of the ethnic communities in relationship to their cultural and natural surroundings, which are called, 'biocultural rights'.[73] According to the Constitutional Court in Atrato, biocultural rights connect the cultural rights of ethnic communities and their rights in natural resources, within the following parameters:

> (i) the multiple ways of life expressed as cultural diversity are inextricably linked to the diversity of ecosystems and territories;

[68] Atrato river case, n. 62 above, at pp. 33–4.

[69] Ibid., at p. 47.

[70] See generally K. Bavikatte & T. Bennett, 'Community Stewardship: The Foundation of Biocultural Rights' (2015) 6(1) *Journal of Human Rights and Environment*, pp. 7–29; M. C. Gavin, J. McCarter, F. Berkes, A. T. P. Mead, E. J. Sterling, R. Tang, & N. J. Turner, 'Effective Biodiversity Conservation Requires Dynamic, Pluralistic, Partnership-Based Approaches' (2018) 10(6) *Sustainability*, pp. 197-220, at 1846; M. C. Gavin, J. McCarter, A. Mead, F. Berkes, J. R. Stepp, D. Peterson, & R. Tang, 'Defining Biocultural Approaches to Conservation' (2015) 30(3) *Trends in Ecology & Evolution*, pp. 140–45; P. Lyver, J. Ruru, N. Scott, J. M. Tylianakis, J. Arnold, S. K. Malinen, C. Y. Bataille, M. R. Herse, C. J. Jones, A. M. Gormley, D. A. Peltzer, Y. Taura, P. Timoti, C. Stone, M. Wilcox, & H. Moller, 'Building Biocultural Approaches into Aotearoa – New Zealand's Conservation Future' (2019) 49(3) *Journal of the Royal Society of New Zealand*, pp. 394–411; G. Sajeva, 'Rights with Limits: Biocultural Rights - Between Self-Determination and Conservation of the Environment' (2015) 1 *Journal of Human Rights and the Environment*, pp. 30–54.

[71] See J. Watson Hamilton & N. Banks, 'Different Views of the Cathedral: The Literature on Property Law Theory' in A. McHarg, B. Barton & A. Bradbrook (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010), pp. 19–59, at 19.

[72] Atrato River case, n. 62 above, p. 36.

[73] Ibid., p. 42.

> (ii) the richness expressed in the diversity of cultures, practices, beliefs and languages is the product of the co-evolutionary interrelationship of human communities with their environments and constitutes an adaptive response to environmental changes;
> (iii) the relationships of different ancestral cultures with plants, animals, microorganisms and the environment actively contribute to biodiversity;
> (iv) the spiritual and cultural meanings of indigenous peoples and local communities about nature are an integral part of biocultural diversity; and
> (v) the preservation of cultural diversity leads to the conservation of biological diversity, so that the design of policy, legislation and jurisprudence should be focused on the conservation of bioculturality.[74]

Perhaps most significantly, after centuries of poor environmental management by the Government and the ignorance of Indigenous interests, the adoption of the biocultural rights concept in the *Atrato* case enables the Court to recognize the 'jurisdiction' of Indigenous peoples as regulators, stewards, and decision makers on the management of the river. It creates new opportunities for them 'to participate in river sharing, governance and use' as river guardians.[75]

3.2 The Colombian Amazon as a Legal Subject

The next Colombian case to recognize a natural resource as a legal subject was the judgement concerning the Colombian Amazon, which responds to the alarming rate of deforestation in the Amazon rainforest, increasing 44% between 2015 and 2016. This destruction, and its associated social and environmental consequences, prompted the applicants in *Andrea Lozano Barragán y otros v la Presidencia de la República y otros* (the Amazon case) to apply to the Colombian courts for protection of their constitutional rights as an *acción de tutela*.[76]

[74] Ibid., at 5.17 *(authors' translation).*

[75] Macpherson, n. 17 above, pp. 159–60.

[76] Amazon case, n. 8above pp. 33-4.

The claimants in the case were 25 children and young people between the ages of seven and 25 who, in representing future generations, were gravely concerned about the impact of deforestation in the region of the Colombian Amazon tropical rainforest.[77] However, unlike the Atrato case, the Amazon claimants did not identify directly with an Indigenous group or rely directly on Indigenous constitutional protections, instead positioning their claims more broadly on behalf of future generations.

The damage to the Colombian Amazon, known as the *'pulmón del mundo'* (lung of the Earth) is well documented in the Amazon case. It is caused by land grabbing, illegal logging, mining, agricultural expansion, and drug cultivation.[78] According to the claimants, this damage extends beyond the Amazon to other areas of the country, as it causes direct and negative effects on the water cycle, alters the ability of soil to capture and absorb water, affects water supply to the *páramo*s (closed, high altitude ecosystems) and other areas in Colombia, and impacts broadly on water availability.[79] The claimants argued that impacts of deforestation in the Colombian Amazon are on a global scale and have global consequences. The massive reduction in trees releases carbon into the atmosphere and reduces the potential to sequester carbon, causing a direct nexus between deforestation and the impact of climate change.[80] 'Paradoxically', the claimants explained, the Colombian Amazon region was better protected during Colombia's long civil war, as the *Fuerzas Armadas Revolucionarias de Colombia* Revolutionary Armed Forced of Colombia (FARC) and paramilitary presence in the Amazon precluded development of the area.[81] Since the signing of the peace agreement with FARC in 2016, the Colombian Amazon region has been 'opened up' to encroachment and development

[77] Amazon case, n. 8 above, p. 30.

[78] Ibid., p. 3.

[79] Ibid.

[80] Ibid., pp. 48, 49.

[81] Ibid., p. 4.

by (sometimes foreign) industry and business interests, with a proliferation of new roads and resource concessions.[82]

On 5 April 2018, the *Corte Suprema de Justicia* (Supreme Court), presided over by Judge Luis Armando Tolosa Villabona, handed down its judgment in the Amazon case.[83] Firstly, the Court accepted that the children and young people could make their claims on behalf of future generations, on the basis that the *acción de tutela* can be sought by any person who requires the protection of fundamental rights and it does not require a specific age or citizenship status. Children and young people are experiencing the negative effects of environmental damage in the Colombian Amazon, the Court reasoned, and as such may legitimately request the protection of their rights to enjoy a healthy environment, life, and health.[84] Thus, recourse to the *acción de tutela* would be appropriate to enable the protection of the fundamental rights of the young claimants and future generations.[85]

Like the Atrato case, the Amazon case rested on constitutional human rights protections, and the claimants argued that by failing to control the increase in deforestation in the Colombian Amazon, the Colombian Government had violated various fundamental rights.[86] In relation to water, the Court considered the report of the *Instituto de Hidrología, Meteorología y Estudios Ambientales* (Institute of Hydrology, Meteorology and Environmental Studies) (IDEAM) on how deforestation alters water resources, and water supply to the populations that depend on it, in this region. The Court also relied on other expert evidence that

[82] 'Base del Plan Nacional de Desarrollo 2018-2022. Pacto por Colombia' [National Development Plan 2018-2022. Pact for Colombia], available at: https://colaboracion.dnp.gov.co/CDT/Prensa/PND-2018-2022.pdf .

[83] Amazon case, n. 8above.

[84] Amazon case, n. 8above, at p, 15.

[85] See also Acosta Alvarado & Rivas-Ramírez, who argue that this case widens the scope of the *acción de tutela* enabling Colombian courts to consider collective as well as individual rights: Acosta Alvarado & Rivas-Ramírez, n. 6 above, at p. 526.

[86] Amazon case, n. 8above.

greenhouse gas (GHG) emissions as a result of deforestation would increase pollutants in the watershed and affect water availability, including through prolonged periods of drought.

Although it is not the focus of this article, the precautionary principle[87] provided support for the Court's radical plan for protection of the Colombian Amazon. The judgment stated that as 'we are late to act to stop global warming, but the precautionary principle invites us to act now before knowing with complete detail the effects of this uncertain phenomena and the effects on future generations which are unknown'.[88] The precautionary principle had similarly been relied upon by the Constitutional Court in the Atrato case, on the basis that the negative effects of illegal mining on river and communities in the future are uncertain.[89]

Finally, the Supreme Court in the Amazon case drew together its analysis by relying on the principle of solidarity in Colombian constitutional law. Article 1 of the Colombian Constitution guarantees a social welfare state based on the rule of law founded in principles that promote 'solidarity' between persons. The Court held that, in order to enable the *ius fundamental* protections enshrined in the Colombian Constitution, it was necessary to consider 'the other' in this process of solidarity. By 'other', the Court envisaged 'others that also inhabit

[87] See generally A. Shawkat & M. Sheikh Noor, 'The Precautionary Principle in Biodiversity and Natural Resource Management: Institutional and Policy Challenges for a Sustainable Future' (2018) 48(3/4) *Environmental Policy and Law*, pp. 187-203.

[88] Atrato river case, n 62 above, p. 9. Data provided by the Instituto de Hidrologia Meteorologia y Estudios Ambientales [Hydrology, Meteorology and Environmental Studies Institute] indicated that the 36% of the GHGs emitted by deforestation is an uncontrolled factor of CO_2 emissions in the country. Based on this evidence and the uncertainty of the future consequences on the environment and water provision, the Court stated the need to take corrective and preventive measures to stop illegal mining that could cause future unknown effects on the Amazon. The precautionary principle is regulated in the Law 99 of 1993, jurisprudence of the Judicial Courts such as the Sentence T-204/14, C-293/2002, C-703/2010, and in international environmental instruments that Colombian has committed to.

[89] Atrato river case, n. 62 above, at para. 9.25. Cf M. del P. Garcia Pachón, 'La Corte Suprema de Justicia reconoce como sujeto de derechos a la Amazonia Colombiana' [The Supreme Court Recognizes the Colombian Amazon as a legal subject] (2018), available at: https://medioambiente.uexternado.edu.co/la-corte-suprema-de-justicia-reconoce-como-sujeto-de-derechos-a-la-amazonia-colombiana/. Garcia Pachón argues that the precautionary principle should not have been applied in the Colombian Amazon case because the extent and impact of deforestation was evident, with no lack of certainty in the scientific evidence requiring a precautionary approach.

the planet, either animal or plant' [90] and 'those yet to be born that also deserve to enjoy the same environmental conditions that we enjoy now'.[91] This meant that the freedom of present generations to act could be limited by an obligation to '*no-hacer*' (do no harm)[92] and instead assume the care and custody of natural resources and the future human world.[93]

At the same time, the Court recognized that 'an ethical duty of solidarity of the species requires equitable and wise consumption by present generations in order to preserve and secure the future subsistence of humankind'.[94] The Court explained that natural resources are shared among all the habitants of the Earth, which includes descendants or new generations and plant and animal species, noting that a lack of future resources necessary to live could put the human species at threat. The Court emphasized the need for humans to take care of the environment, and to start thinking about our obligations to nature and humanity in general instead of focusing on individual rights to use resources.[95] As such, the Court adopted from the Atrato decision the idea of nature as a legal subject and declared the Colombian Amazon 'a right holder of the protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it'.[96]

In contrast to the Atrato case, the Supreme Court in the Amazon decision did not consider the impact of deforestation and climate change upon the many Indigenous communities of the Amazon, who depend on access to water and land to survive and preserve

[90] Amazon case, n. 8above, p. 18.

[91] Ibid., p. 19.

[92] For a discussion of the duty to 'do no harm' in accordance with the precautionary principle, see generally R. Attfield, 'To Do No Harm? The Precautionary Principle and Moral Values' (2001) 1(3) *Philosophy of Management*, pp. 11–20.

[93] Amazon case, n. 8above, p. 21.

[94] Ibid., p. 134.

[95] Ibid., p. 18.

[96] Ibid., p. 134.

their culture. The analysis of solidarity towards 'others' simply lumped Indigenous communities in with the other communities concerned about the Amazon, including the applicants, who lived in urban centres like Bogotá and were removed from the local context and its challenges. Meanwhile, large-scale projects run by powerful actors encroach on Indigenous land with state approval or acquiescence, prompting the mobilization of Indigenous communities to defend their land and water.[97]

The Amazon case also failed to mention Indigenous land tenure, despite the fact that Indigenous territories (*resguardos*) cover 54.18% of the Colombian Amazon extension,[98] nor did it refer to the idea of biocultural rights or appoint guardians. Despite this fairly major oversight, the Government has considered the need for participation by Indigenous groups in its implementation of the Supreme Court decision. The Court made a number of detailed orders for implementing the decision, calling on different government departments and entities and NGOs to perform specific functions and mandating the creation of a *'Plan de Acción'* (Action Plan) to combat deforestation effects and enforce the decision.[99] Within five months, the central government was required to prepare the *Pacto Intergeneracional por la Vida del Amazonas Colombiano (PIVAC)* (Intergenerational Pact for the Life of the Colombian Amazon), with measures directed at reducing deforestation to zero. Local authorities were also asked to

[97] See D. Hill, '"Defending our Existence": Colombian Tribe Stands in way of Oil Exploration' (2019), available at: available at https://www.theguardian.com/world/andes-to-the-amazon/2019/apr/02/colombia-siona-tribe-oil-exploration-territory-putumayo.

[98] See generally Gentes, n. 31, above, p. 86; G. Amazonas, 'From Farms To Forests: Land Rights as an Impact (2019), available at: https://www.gaiaamazonas.org/recursos/videos/60/; G. Amazonas, 'Gaia Amazonas -Trece pueblos indígenas de la Amazonía colombiana recuperan más de 44.000 hectáreas de su territorio ancestral' [Thirteen Indigenous Groups in the Colombian Amazon recover 44,000 Hectares of their Ancestral Territory], available at: available at: https://www.gaiaamazonas.org/noticias/51/.

[99] Amazon case, n.8 above, pp. 47–50.

implement 'Territorial Arrangement Plans',[100] which may prove controversial if they interfere with Indigenous territorial autonomy.[101]

The Action Plan refers to a strategy called the *Estrategia Bosques Territorios de Vida* (Forest Territories' Strategy for Life) created and funded by the United Nations Reducing Emissions from Deforestation and Degradation (UN-REDD) programme.[102] The Strategy for Life recognizes the key role played by Indigenous peoples to combat deforestation in the Colombian Amazon, with the goal of consolidating 'territorial governance of ethnic groups and agricultural and rural communities'.[103] The Action Plan provides that Indigenous peoples, their holistic vision and '*resguardos*', are a necessary part of the inter-institutional coordination for the proper management of the Colombian Amazon,[104] alongside related planning documents which emphasize the importance of Indigenous stewardship in tackling environmental problems.[105] Unfortunately, the Action Plan was created by the previous government administration and, as the incoming government is yet to formally mandate the Action Plan, its status is uncertain.

[100] Ibid.

[101] Acosta Alvarado and Rivas-Ramírez, n. 6above, p. 525.

[102] 'Bosques Territorios de Vida- Estrategia Integral de control a la deforestación y Gestión de los Bosques - UN-REDD Programme Collaborative Online Workspace', available at: https://www.unredd.net.

[103] Ibid., at p. 25.

[104] Ibid., at pp. 92, 330.

[105] 'El Tratado de Cooperación Amazónica Planes y Programas' [Plans and Programmes of the Amazon CooperationTreaty], available at: http://www.oas.org/dsd/publications/unit/oea08b/ch03.htm#TopOfPage; Ministerio de Ambiente y Desarrollo Sostenible and Ministerio de Agricultura y Desarrollo rural, 'Plan de Acción para reducir la deforestación y hacer frente a los efectos del cambio climático en la Amazonía colombiana – STC 4360 de 2018' [Action Plan to Reduce Deforestation and Respond to Climate Change Effects in the Colombian Amazon] (2018) ('Action Plan for Colombian Amazon'); Bosques Territorios de Vida, n. 102 above.

4. RIVERS AND ECOSYSTEMS RIGHTS AND INDIGENOUS PEOPLES IN COLOMBIA – A BIOCULTURAL IMPERATIVE

The Atrato and Amazon decisions have spurred a string of cases declaring rivers and ecosystems to be legal subjects in Colombia. The Cauca river, together with its watershed and tributaries, was declared a legal subject by the Superior Tribunal of Medellín (a local Tribunal in the Department of Antioquia) in June 2019, as a result of an *acción de tutela* for protection of the rights of future generations brought by local and rural communities in response to a hydroelectric development.[106] The Court ordered the establishment of a similar governance structure to the arrangements in the Atrato case,[107] with a committee of guardians including government and community representatives,[108] and an expert advisory panel.

The Cauca River case was followed in June 2019 by decision of the Administrative Tribunal of Tolima to recognize that a number of rivers making up the 'Tolima Rivers' were legal subjects,[109] issued in response to concerns about mining in the Combeima and Cocora Basin.[110] This case was an '*acción popular*'[111] brought by a local municipality in order to protect the collective rights of the people of Ibagué whose water supply from the basin would be affected by the mining.[112] The Tolima Tribunal found a 'breach of the collective rights to enjoy a public space free of pollution, a healthy environment and ecological equilibrium, prevention

[106] Cauca River case, n. 8 above, at p. 39.

[107] Ibid., at p. 41.

[108] Ibid. The group met on 27 February 2019 at the University of Antioquia.

[109] '*Personeria Municipal'* is the governmental office that protect human rights and the conservation of the environment in a municipality. It is part of the Office of the Inspector General of Colombia and in this case represents the people in a municipality.

[110] Tolima Rivers case, n. 8 above.

[111] The writ of *Acción popular* is provided in Article 88 of the Colombian Constitution for the 'protection of collective rights and interests related to the heritage, space, security, public health, administrative, moral, environmental, free economic competence and other similar matters' (*authors' translation*) in Political Constitution of Colombia, n. 27 above, Art. 80.

[112] Tolima rivers case, n. 8 above.

of preventable disasters, security and public health'.[113] It then declared the Coello, Combeima and Cocora rivers, their watersheds and tributaries to be legal subjects with their own rights of protection, conservation, maintenance and restoration.[114] The Tribunal referred to international and comparative law and jurisprudence on the human right to water and food security in support of its decision, and grasped onto domestic jurisprudence around the Constitution and *Estado Social de Derecho*.[115] As a precautionary and preventive measure, the Tribunal ordered the cessation of mining activities and permissions which could cause irreparable or irreversible damage to ecosystems and natural resources.[116] As in the Atrato and Cauca cases, the Tolima Tribunal created a collaborative governance regime (with representatives of the rural communities as guardians) and extended orders to create and act to decontaminate the river, and recover traditional forms of livelihoods and food security.[117] The Court did order the involvement of local communities, referring to the ILO Convention 169, which at least led to the involvement of Indigenous and ethnic communities in the guardianship model.[118] However, neither Indigenous nor ethic communities participated directly in the action so they did not have a chance to voice their concerns or assert particular rights.

The Colombian river cases, whereby the courts are offering rights of nature as a pragmatic response to environmental conflicts, challenge traditional legal paradigms. In this

[113] Ibid., p. 146.

[114] Ibid., p. 149.

[115] Ibid., at p. 63. The Court reasoned that water pollution would affect the vegetation, soil and drinking water, risking the availability of food and health of the people that live in the area. Water access and the right to food are associated in international environmental law. See, eg, Dublin Declaration on Water and Sustainable Development (International Conference on Water and Development-Development for the 21st century), Dublin, 1992, A/CONF, 151/pc/112); United Nations, The Millennium Development Goal Report 2014 available at https://www.undp.org/content/undp/en/home/librarypage/mdg/the-millennium-development-goals-report-2014.html at p. 13.

[116] Ibid., p.125.

[117] Ibid., pp. 153–4.

[118] Ibid., p. 140.

rapidly-developing jurisprudence, the judicial branch forces the executive government to take action, where it has previously neglected its environmental obligations of protection of the environment and the rights of Indigenous communities.

The strength of the Atrato case resides in the way in which the Constitutional Court combined cultural and environmental imperatives to develop a new concept of biocultural rights, drawing on the closeness of Indigenous and ethnic peoples and river ecosystems.[119] Biocultural rights, devised by the Court in Atrato in their analysis of third-generation human rights, account for the rights, interests, and tenures of Indigenous peoples by preserving practices related to the kinship of ethnic communities and their duty of stewardship towards nature.[120] Biocultural rights open the door to Indigenous participation in environmental law frameworks while respecting Indigenous collective and territorial rights. This approach not only accords with legal and constitutional principles, it reflects the reality of land and water rights, interests and tenure, and accounts for the traditional knowledge systems of Indigenous and tribal peoples as guardians.

However, as in the Amazon case, the tribunals in the Tolima and Cauca cases gave inadequate consideration to the possibility that ethnic communities might also have interests in the rivers' management. Researchers have often documented the grave error made by water regulators when they ignore Indigenous normative systems, as Indigenous peoples contribute to improved management of water and land on their territories by drawing on their values, knowledge, and experience in resource management.[121] Instead, governments should devise

[119] Macpherson, n. 17 above, p. 154.

[120] See Lyver et al, n. 70 above, pp. 394-407; Bavikatte & Bennett, n. 70 above, pp. 10-11; A. Grear, 'The Discourse of Biocultural Rights and the Search for New Epistemic Parameters: Moving beyond Essentialisms and Old Certainties in an Age of Anthropocene Complexity Editorial' (2015) 1 *Journal of Human Rights and the Environment*, pp. 1–6; Sajeva, n. 70 above.

[121] See, e.g.; R. Boelens, B., Duarte, R. Manosalvas, P. Mena, T. Roa J vera 'Contested Territories: Water Rights and the Struggles over Indigenous Livelihoods' (2012) 3(3) International Indigenous Policy Journal; I. Gentes, n. 31 above,pp. 81–111.

legal tools and mechanisms that allow Indigenous peoples and local communities to defend their territory from powerful development interests, and grant them the autonomy to manage their resources in their own cultural ways.

5. CONCLUSION

The recognition of the rights of rivers and related ecosystems is developing particularly quickly in Colombia, highlighting the potential for the concept of ecosystem rights to be shaped by the Colombian experience. Legal rights for rivers and ecosystems in Colombia are building a new type of constitutionalism for nature: a rights revolution beyond traditional Western law.

At the start of this article, we asked whether legal rights for rivers and ecosystems might help Indigenous communities to demand better and more collaborative river and ecosystem management within their territories. On occasion, ecosystem rights cases have been led by, or decided with respect for, Indigenous peoples and ontologies, raising hope for Indigenous peoples (and local communities) in other parts of the world that legal rights for rivers might help them to similarly demand better and more collaborative river and ecosystem management within their traditional areas. In other cases, ecosystem rights have provided a new way for local or rural communities to participate in river governance.

However, our analysis of the Colombian jurisprudence shows that the Colombian courts have sometimes ignored or obscured Indigenous perspectives, or failed to engage deeply with the legal and institutional complexity of Indigenous rights, interests, and tenures. Although most recent cases have replicated the legal person model put forward in the Atrato river case, the cases fail to recognize and respond to the unique connection that Indigenous peoples and Afro-Colombians have with their land and water. Subsequent cases have failed to acknowledge

biocultural rights and the role of local communities in providing environmental stewardship in accordance with their culture.

This finding has transnational relevance for the rights of nature movement and the settling of Indigenous resource-related disputes more generally. It raises new questions about who is entitled to speak for nature (particularly rivers), and draws new legal paths for rural and even urban communities to participate in management of rivers and the environment. Ultimately, only with strong community buy-in do legal rights for rivers and ecosystems offer the potential for increased Indigenous involvement in and control over natural resource management and, consequently, improved Indigenous-governmental relationships.